Supreme Court, U.S.
FILED

031036 JAN 16 2004

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

STARR M. LAKE,

Petitioner,

v.

BELINDA STEWART,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael E. de Grasse
Counsel for Petitioner
59 So. Palouse St.
P.O. Box 494
Walla Walla, WA 99362
509.522.2004

QUESTION PRESENTED

Whether reasonable jurists could find the following issue debatable, or could conclude that it is adequate to deserve encouragement to proceed further: Should a prisoner who is claiming denial of constitutional rights, and who has diligently pursued her only and timely round of state court collateral review have prefiling preparation time counted against her in determining whether the AEDPA statute of limitations was tolled?

TABLE OF CONTENTS

	Page
Question Presented	i
Opinion and Orders Below	1
Jurisdiction	1
Pertinent Constitutional and Statutory Provisions and Rules	2
Statement of the Case	4
Reasons for Allowing the Writ	5
Conclusion	8
Appendix:	
Report and Recommendation to Dismiss Habeas Petition with Prejudice as Time-Barred	A1-A4
Order Dismissing Habeas Petition with Prejudice as Time-Barred	B
Judgment	C
Order Denying Motion for Relief from Judgment and Order	D1- D2
Order Denying Certificate of Appealability (by District Court)	E1-E2
Order (Denying Request for Certificate Of Appealability, by Court of Appeals)	F
Objections to Report and Recommendation and Statement of Counsel	G1-G6
Application for Certificate of Appealability	H1-H7
Declaration in Response to Second Order to Show Cause	I1-I3
Declaration in Response to Order to Show Cause	J1-J 9

TABLE OF AUTHORITIES

Cases

	Page
Carey v. Safford, 536 U.S. 214 (2002)	8,9,10
Miller-El v. Cockrell, 537 U.S. ____, 123 S. Ct.1029 (2003).	8

Statutes

28 U.S.C. 2241	6
28 U.S.C. 2244	6,8
28 U.S.C. 2253 (c) (2)	7,8
RCW 10.73.090	5,8

Rules

RAP 16.3	5

Constitutional Provisions

U.S. Const., amend. XIV	7

PETITION FOR WRIT OF CERTIORARI

COMES NOW the petitioner, Starr M. Lake, and respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINION AND ORDERS BELOW

The Magistrate Judge's report and recommendation to dismiss the habeas petition with prejudice as time-barred is found at Appendix A1. The District Court's order denying motion for relief from judgment and order is found at Appendix D1. The District Court's order denying a certificate of appealability is found at Appendix E.

JURISDICTION

The petitioner seeks review of the order of the Court of Appeals of October 21, 2003, denying her request for a certificate of appealability. (Appendix F) This petition is filed within ninety days after October 21, 2003.

This Court's jurisdiction is based on 28 U.S.C. 1254 (1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 28 U.S.C. 2244 (d) (2):

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Revised Code of Washington, RCW 10.73.090(1):

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filled more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

Washington State Rules of Appellate Procedure (RAP):

RAP 16.3(a)

(a) **Habeas Corpus and Postconviction Relief.** Rules 16.3 through 16.15 and rules 16.24 through 16.27 establish a single procedure for original proceedings in the appellate court to obtain relief formerly available by a petition for writ of habeas corpus by an application for post-conviction relief.

RAP 16.3 (c)

(c) **Original Appellate Court Jurisdiction.** The Supreme Court and the Court of Appeals have original concurrent jurisdiction in personal restraint proceedings in which the death penalty has not been decreed.

The Supreme Court will ordinarily exercise its jurisdiction by transferring the petition to the Court of Appeals....

RAP 16.4(d)

(d) **Restrictions.** The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RAP 16.7(a) (2)

(a) **Generally.** Under the titles indicated, the petition should set forth:

(2) **Grounds for Relief.** A statement of (i) the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations, (ii) why other remedies are inadequate, and (iii) why the petitioner's restraint is unlawful for one or more of the reasons specified in rule 16.4 (c). Legal argument and authorities may be included in the petition, or submitted in a separate brief as provided in rule 16.10(a).

United States Constitution, Amendment XIV, Section 1:

> ...[N] or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After Starr M. Lake's second degree murder convictions were affirmed on direct appeal she pursued state court collateral review. (App. J5) Under Washington law, RCW 10.73.090, she was allowed one year to develop her case for collateral review. She pursued this course diligently, and filed a proper and timely personal restraint petition. (App. J5)

The process of collateral review in Washington is an appellate process from the beginning. (RAP 16.3) Thus, Ms. Lake spent most of the one-year period allowed her under Washington law preparing an adequate personal restraint petition to the Washington State Court of Appeals. (App. G3-G4) Her petition was timely, but was denied on the merits. (App. J5) Her attempts to reverse this denial through further appellate litigation were timely but unavailing. (App. J5, J8)

Ms. Lake sought a writ of habeas corpus in federal court after her state court efforts were concluded. (App. J1) Her petition was dismissed as time-barred. The District Court held that the time before her initial filing for state court collateral relief counted against her in determining the federal, one-year statute of limitations under the AEDPA, 28 U.S.C. 2244. (App. B)

Ms. Lake's application for a certificate of appealability was denied by the District Court, and the Court of Appeals. (App. E, F) Ms. Lake now petitions for certiorari to review the Court of Appeals decision denying a certificate of appealability.

The basis for federal jurisdiction in the Court of first instance is the AEDPA, 28 U.S.C. 2241 *et seq.*

REASONS FOR ALLOWING THE WRIT

I. The Petitioner Presented Valid Claims that She had been Denied Constitutional Rights.

As Ms. Lake's petition was dismissed, *sua sponte*, as time-barred, she never developed her constitutional claims beyond the stage of initial pleading. Nonetheless, her petition set forth five, discrete grounds for a writ of habeas corpus based on denial of constitutional rights guaranteed by the U.S. Constitution, Amendment XIV, 1.(App. H5-H7):

FIRST GROUND

The petitioner was deprived of her right to due process because her trial judge was biased against her and in favor of the prosecution.

SECOND GROUND

The petitioner was deprived of due process by a sua sponte venue change to a county of improper venue.

THIRD GROUND

The petitioner was deprived of due process and a fair trial by reason of a juror's failure to disclose material facts during voir dire.

FOURTH GROUND

The petitioner was deprived of due process and a fair trial by reason of improper communication between a juror and a bailiff.

FIFTH GROUND

The petitioner was deprived of due process and a fair trial by an absence of appearance of fairness on the part of the trial judge.

Thus, the petitioner met the threshold standard for a certificate of appealability required by the AEDPA 28 U.S.C. 2253 (c) (2).

The summary, one-sentence denial of a certificate of appealability by the Court of Appeals appears to have adjudicated the claimed denial of constitutional rights on the merits. (App. F) Therefore, the decision below fails to meet the standard of 28 U.S.C. 2253 (c) as precedentially established. *Miller-El v. Cockrell,* 537 U.S___, 123 S. Ct. 1029 (2003)

II. Treating the Petitioner's State Court Appeal as Pending During all Times She was Diligently Pursuing Collateral Review is Supported by Statutory Language, Logic and Policy

Where, as here, the petitioner has worked diligently in her attempt to obtain state court collateral review, her application should be deemed "pending" a la 28 US.C. 2244 (d) (d), for all time periods during which she could have properly filed an application. The term "pending" should be held to mean "until the completion of" the state collateral review process. *Carey v. Saffold,* 536 U.S. 214, 219 (2002).Where, as here, the petitioner was pursuing collateral review throughout the one-year period limited by state law, (RCW 10.73.090) during which her initial application could have been filed, it should be deemed "pending" throughout that period.

Time spent (as here, App. G3-G4) preparing the initial application for state court collateral review should be treated the same as time allowed to prepare successive applications to higher courts after denials in lower courts. This conclusion logically follows from the holding and rationale of *Carey, supra.* To deny this conclusion would contravene the AEDPA requirement that the petitioner must exhaust her state remedies before pursuing federal habeas relief.

Where, as here, the petitioner diligently pursued her state remedies during all delimited time periods, her state court application should be deemed pending throughout those periods. Her application should be deemed pending during the prefiling grace period allowed for presenting her initial application just as it is deemed pending during the prefiling grace periods allowed for presenting subsequent appeals concerning that initial application.

The petitioner's diligent efforts to pursue one, complete round of state court collateral review should not be rebuffed by an unduly severe interpretation of the AEDPA's statute of limitations. Among the goals that the AEDPA promotes, are those of comity, finality and federalism. *Carey, supra*, at 220. Where, as here, the petitioner has diligently pursued only one round of state court collateral review, sound policy underlying the AEDPA should toll its statute of limitations throughout the time that the petitioner was engaged in that pursuit. On the facts, the petitioner has shown she was actively engaged in that pursuit before her

initial state court application was filed. (App. G3-G5) Her efforts during similar grace periods on appeal tolled the AEDPA statute of limitations. Those efforts should likewise toll it during the prefiling grace period of her initial application.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Dated this 15th day of January, 2004

Respectfully submitted,

_____

Michael E. de Grasse
Counsel for Petitioner

APPENDIX

Filed in the U.S. District Court Eastern District of Washington Apr– 4 2003 James R. Larsen, Clerk Spokane, Washington

United States District Court
Eastern District of Washington

Star M. Lake,
Petitioner,
vs.

Belinda Stewart,
Respondent.

NO. CT-03-5006-CI
Report and Recommendation to Dismiss Habeas Petition with Prejudice as Time –Barred

BEFORE THE COURT is Petitioner's response through Attorney Michael E. de Grasse to the court's Second Order to Show Cause why Ms. Lake's federal habeas corpus petition should not be time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. 2244 (d) (1). Court records indicate Respondent has accepted service of the petition (Ct. Rec. 2) although she has not entered a notice of appearance and the court has not directed her to respond to this petition.

The petition is before the court on Report and Recommendation. The parties have not consented to proceed before a magistrate judge. The court has reviewed the petition and Counsel's submissions, and for the reasons stated below, finds Ms. Lake's petition is untimely.

Petitioner's application for federal habeas relief is governed by the AEDPA as her application was filed after the effective date of that Act, April 24, 1996. *Lindh v. Murphy,* 521 U.S. 320, 327-27 (1997). Under the AEDPA, state prisoners must file their federal habeas petition within one year

from the conclusion of their direct appellate review in state court. Additionally, that time limit will be tolled for "properly filed" state collateral proceedings. 28 U.S.C. 2244 (d) (1) - (2).

Ms. Lake was convicted of two counts of Second Degree Murder in Walla Walla County in 1998. On direct appeal, the Washington Supreme Court denied review on July 11, 2000, and Ms. Lake did not seek certiorari in the United States Supreme Court. Based on the Ninth Circuit decision in *Bowen v. Roe,* 188 F.3d 1157 (9th Cir. 1999), Ms. Lake's conviction became final ninety days later, on or about October 10, 2000, *See id.* at 1159. The AEDPA's one-year limitations period began to run on that date and Ms. Lake had until approximately October 10, 2001, to file her federal habeas petition, unless it was tolled.

Petitioner indicates her personal restraint petition (PRP) was filed in the Washington State Court of Appeals, Division III, on July 16, 2001, which presumably tolled the limitations period. See 28 U.S.C.2254 (d) (2) (The one-year statute of limitations is statutorily tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."). At that time, however, more than nine months of the AEDPA limitations period had already expired. See *Nino v. Galaza,* 183 F.3d 1003, 1006 (9th Cir. 1999) ("AEDPA's statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case 'pending' during that interval.")[1]

[1] Petitioner's reference to *Carey v. Saffold,* 536 U.S. 214, 122 S.Ct. 2134 (2002), evaluating California's unique state collateral review system of intervals between the state court's disposition of a state habeas petition and the filing of a petition at the next state appellate level, does not alter this finding.

Petitioner asserts the dismissal of her PRP by the Washington State Court of Appeals, Division III, became final on April 2, 2002. Assuming, without deciding, Ms. Lake's PRP was properly filed and pending until April 2, 2002, she still had less than three months after that date to file her federal habeas corpus petition. Yet, more than nine months passed before Ms. Lake's federal habeas corpus petition was filed on January 21, 2003.

Petitioner has presented no statutory or equitable basis to toll the AEDPA's limitation period. Equitable tolling of the AEDPA is appropriate only where extraordinary circumstances beyond a prisoner's control render it impossible to timely file a petition. *Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997),* overruled on other grounds by *Calderon v. United States District Court (Kelly),* 163 F.3d 530 (9th Cir.1998) (en banc). "When external forces, rather than a petitioner's lack of diligence account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate. *"Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir. 1999). An attorney's "miscalculation of the limitations period... and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling." *Frye v. Hickman,* 273 F.3d 1144, 1146 (9th Cir. 2001), cert. denied,____ U.S.____ 122 S.Ct. 1913 (2002)

In summary, the limitations period in this action began running on or about October 10, 2000, when the direct appeal of the conviction became final. More than nine months later, the clock stopped on July 16, 2001, and presumably was tolled until April 2, 2002, while Ms. Lake's state collateral challenge was under review. At that point, the clock resumed running and the limitations period expired less than three months later. Petitioner waited an additional six months before filing her federal habeas corpus petition on January 21, 2003.

Absent equitable or statutory tolling, Ms. Lake's federal habeas corpus petition is untimely. The court granted Petitioner several opportunities to demonstrate the timeliness of her petition and she has failed to do so. Accordingly, **It Is Recommended** the petition be **Dismissed with prejudice as time-barred.**

OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within ten (10) days following service with a copy thereof. Such party shall file with the District Court Executive all written objections, specifically identifying the portions to which objection is being made, and the basis therefore. Attention is directed to Fed. R. Civ. P. 6(e), which adds another three (3) days from the date of mailing if service is by mail.

A district judge will make a *de novo* determination of those portions to which objection is made and may accept, reject, or modify the magistrate judge's determination. The district judge need not conduct a new hearing or hear argument and may consider the magistrate judge's record and make an independent determination thereon. The district judge may also receive further evidence or recommit the matter to the magistrate judge with instruction. See 28 U.S.C. 636(b) (1) (B) and (C), Fed. R. Civ. P. 73, and LMR 4, Local Rules for the Eastern District of Washington A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The District Court Executive is directed to enter this Report and Recommendation and forward copies to Petitioner's counsel and to Respondent
Dated this 4th day of April 2003.
CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE

Filed in the U.S. District Court Eastern District of Washington May13, 2003 James R. Larsen, Clerk Spokane, Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Starr M. Lake,
Petitioner,
vs.
Belinda Stewart,
Respondent.

No. CT-03-5006-CI

ORDER DISMISSING HABEAS PETITION WITH PREJUDICE AS TIME-BARRED

Magistrate Judge Imbrogno filed a report and Recommendation on April 4, 2003, recommending Ms. Lake's habeas corpus petition be dismissed with prejudice as time-barred. There being no objections, the court ADOPTS the Report and Recommendation. The Petition is **DISMISSED WITH PREJUDICE** as untimely under 28 U.S.C. 2244 (d) (1).

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, forward a copy to Petitioner's counsel and close the file.

Dated the 13 day of May 2003

Robert H. Whaley
United States District Judge

Filed in the U.S. District of
Washington May 13, 2003
James R. Larsen, Clerk
Spokane, Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Starr M. Lake,
Petitioner,

vs.

Belinda Stewart,
Respondent

NO. CT-03-5006-CI

JUDGMENT

DECISION BY THE COURT:

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Report and Recommendation is ADOPTED; The Petition is **DISMISSED WITH PREJUDICE** as untimely under 28 USC 2244(d)(1)

DATED this 13th day of May, 2003.

James R. Larsen
District Court Executive/Clerk
By Deputy Clerk

Filed in the U.S District Court Eastern District of Washington Jun 10, 2003, James R. Larsen, Clerk Spokane, Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Starr M. Lake,
Petitioner,
v.
Belinda Stewart,
Respondent.

NO. CT-03-5006-CI

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND ORDER

BEFORE THE COURT is petitioner's Motion for Relief from Judgment and Order (Ct. Rec. 10) through Attorney Michael E. de Grasse. The motion is noted for hearing without oral argument on June 6, 2003. Petitioner brings this motion pursuant to Rule 60(b). The assertion that Petitioner's "application for state court collateral relief should be held to have been pending during the periods of time before her initial petition was filed..."is precluded by Ninth Circuit case law. See *Nino v. Galaza,* 183 F. 3d 1003,1006 (9th Cir.1999) ("AEDPA's statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the first state collateral challenge is filed because there is no case 'pending' during that interval."). This was addressed in the Report and Recommendation.[1]

[1]Again, Petitioner's reference to *Carey v. Saffold,* 536 U.S. 214, 122 S. Ct. 21234 (2002), evaluating California's unique state collateral review system of intervals between the state court's disposition of a state habeas petition and the filing of a petition at the next state appellate level, does not alter this finding.

Although the court will accept counsel's averment he did not receive a copy of the Report and Recommendation until May 15, 2003, Petitioner has failed to present the type of newly discovered evidence or other "extraordinary circumstance" that would warrant disturbing the court's judgment. See *United States v. State of Washington,* 98 F.3d 1159, 1163 (9th Cir. 1996).

Accordingly, **IT IS ORDERED** Petitioner's Motion (Ct. Rec. 10) is **DENIED.** The Order and Judgment entered May 13, 2003, are affirmed.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, forward a copy to Petitioner's counsel and close the file.

DATED this 10 day of June 2003.

Robert H. Whaley
United States District Judge

Filed in the U.S. District Court Eastern
District of Washington Aug 13, 2003
James R. Larsen, Clerk
Spokane, Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Starr M. Lake,
Petitioner,
vs.
Belinda Stewart,
Respondent.

NO. CT-03-5006 RHW
ORDER DENYING CERTIFICATE OF APPEALABILITY

By order entered May 13,2003, the Court denied Defendant's Habeas Petition (Ct. Rec. 8). Defendant has filed an Application for Certificate of Appealability (Ct. Rec. 17).

In a habeas corpus proceeding before a district court, the prisoner can appeal the final order if a court of appeals justice or district court judge issues a certificate of appealability (COA). 28 U.S.C. 2253 (2000). A court may issue a COA only upon the "substantial showing," of the denial of a constitutional right." 28 U.S.C. 2253 (c)(2). The United States Supreme Court, in summing up the standard for "substantial showing," held that a prisoner must demonstrate that "reasonable jurists could debate whether (or for that matter, agree) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) *citing Barefoot v. Estelle,* 463 U.S. 880, 894 (1983). For reasons set out in the May 13, 2003 order, the Court sees no arguable points raised by the Defendant that satisfy this standard.

Accordingly, **IT IS HEREBY ORDERED:**

Defendant's Request for Certificate of Appealability (Ct. Rec. 115) is **DENIED. IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this order and to furnish copies to Defendant and to counsel for Plaintiff.

DATED this 13 day of August 2003.

Robert H. Whaley, United States District Judge

Filed Oct 21, 2003 Cathy A. Catterson, Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Starr M. Lake,
Petitioner-Appellant,
v.
Belinda Stewart,
Respondent-Appellee.

NO. 03-35691 D.C.
No CV-03-05006-CI
Eastern Washington
(Yakima)

ORDER

Filed in the U.S. District Court Eastern District of Washington Oct 27 2003 James R. Larsen Clerk Spokane, Washington

Before: WARDLAW and BERZON, Circuit Judges.
The request for a certificate of appealability is denied. See 28 U.S.C. 2244(d)(1), 2253(c)(2).

Received
Oct. 27, 2003
Clerk U.S. District Court
Yakima, Washington

A True Copy Cathy A. Catterson Clerk of Court Attest Oct 21, 2003By Jane Cross Deputy Clerk

Filed in the U.W. District Court
Eastern District of Washington
June 10, 2003
James R Larsen, Clerk
Spokane, Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Starr M. Lake,
Petitioner,
v.
Belinda Stewart,
Respondent.

NO. CT-03-5006-CI
OBJECTIONS TO REPORT AND RECOMMENDATION AND STATEMENT OF COUNSEL

COMES NOW the petitioner and submits the following objections to the Report and Recommendation to Dismiss Habeas Petition with Prejudice as Time-Barred, by Magistrate Judge Cynthia Imbrogno, dated April 4, 2003. These objections are supported by the subjoined statement of counsel.

OBJECTIONS

1. The petitioner objects to the finding and conclusion that at the time she filed her personal restraint petition, "more than nine months of the AEDPA limitations period had already expired." (Report and Recommendation, p. 2, 11. 17-24)

2. The petitioner objects to the finding that her case seeking collateral relief form state court was not "pending" during the interval between the state court final decision on direct appeal and the filing of a personal restraint petition. (Report and Recommendation, p. 2, 1. 25-- p. 3, 1. 2)

3. The petitioner objects to the finding that she has presented no statutory or equitable basis to toll the AEDPA's limitation." (Report and Recommendation, p. 3, 11. 10-11)

4. The petitioner objects to the finding that she "waited an additional six months before filing her federal habeas corpus petition on January 21, 2003." (Report and Recommendation, p. 4, 11. 10-11)

5. The petitioner objects to the conclusion that she has failed to demonstrate that her petition is timely. (Report and Recommendation, p. 4, 11. 14-15)

6. The petitioner objects to the recommendation that her petition be dismissed with prejudice as time-barred. (Report and Recommendation, p. 4, 11. 15-16)

GROUNDS FOR OBJECTIONS

In accordance with the rationale of *Carey v. Saffold*, 536 U.S. 214, 154 L. Ed. 2d 260, 122 S. Ct. 2134 (2002) the petition should be regarded as timely. Applying principles of comity, finality and federalism, the petitioner should be allowed to complete a full round of state court collateral review during which time the AEDPA limitations period should be tolled. Included during the period that is tolled should be all time during which the collateral review process is not complete. Logically, this time must include prefiling periods during which the petitioner is investigating facts, analyzing issues and preparing her initial petition for relief.

The foregoing is supported by the subjoined statement of counsel.

STATEMENT OF COUNSEL

Michael E. de Grasse under penalty of perjury pursuant to the Laws of the State of Washington, RCW 9A.72.085, states as follows:

I am and have been counsel of record for the petitioner, Starr M. Lake. I represented her at trial and on direct review of her convictions. I also represented her in state court collateral proceedings. These proceedings were undertaken only after consultation with other counsel and investigation of various lines of attack. Among other things, I attempted to ascertain the circumstances of another individual who was charged with the same crimes as my client. Attached hereto is a copy of my letter of September 29, 2000, to Michael D. Jansen that show a part of my effort.

Only after spending several months in determining the best approach to state court collateral relief, was a personal restraint petition filed. That filing was timely. The same process was followed before filing the instant petition in this Court.

Preparing a personal restraint petition to the Washington State Court of Appeals is complex and time consuming . A personal restraint petition is not at all like a civil complaint which ordinarily precedes a period of investigation, analysis and motion practice. A personal restraint petition is not at all like a notice of appeal which precedes a period of record review and briefing. Among the requirements that a petitioner must satisfy is that of stating "the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations...." RAP 16.7(a)(1). To met the requirements of this rule, time consuming investigative and analytical work must be completed before filing a personal restraint petition.

Much of the necessary prefiling work in preparing a personal restraint petition in Washington is not displayed in the petition itself. To avoid waiver defenses, a state court petitioner must consider all avenues of collateral relief. Many avenues will be ultimately found to be unworthy of formal pursuit.

Yet, those avenues of collateral relief must, in fact, be pursued before the personal restraint petition is filed. That a petitioner spends months in this effort to obtain state court collateral relief before filing a personal restraint petition should not impair her ability to later present a federal habeas corpus petition.

Neither the petitioner nor I were negligent or dilatory in actively pursuing state court collateral relief at all material times. The petitioner's goal was to explore all avenues of collateral relief before actually filing a petition. Nothing that was done in state court was untimely. The petitioner has pursued state court collateral relief only once. As her counsel, I have been careful and diligent.

The foregoing statement is submitted in support of the petitioner's objections to the Report and Recommendation of Magistrate Judge Cynthia Imbrogno dated April 4, 2003.

CONCLUSION

The Report and Recommendation of April 4, 2003, should be rejected. The petitioner's objections to that Report and Recommendation should be sustained.

Following the rationale of *Carey v. Saffold*, 536 U.S. 214, 154 L. Ed. 2d 260, 267-268, 122 S. Ct. 2134 (2002), the petitioner should be held to have had a "pending" application through all periods during which she was pursuing collateral relief. Specifically, her application for state court collateral relief should be held to have been pending during the periods of time before her initial petition was filed and during the periods of time after decisions were made concerning that petition and before appeals of those decisions were filed.

An order of this Court should be entered holding that the instant petition is timely.

Dated this 16th day of May, 2003, at Walla Walla, Washington.

Respectfully submitted,

Michael E. de Grasse
Counsel for Petitioner

[Attachment to Objections}

Michael E. de Grasse
59 South Palouse Street Walla Walla, WA 99362 P.O. Box 494

September 29, 2000

Michael D. Jansen #772800
L-B-43-U P.O. Box 1809
Airway Heights Correction Center
Airway Heights, WA 99001-1809

Re: State v. Lake

Dear Mr. Jansen:

Thank you for you letter of September 12, 2000.

Starr Lake reports that she has a job as a teacher's aide and her security level is maximum. I think Starr is doing as well as could be expected, under the circumstances.

Please respond to the following questions:

1. Exactly what were the components of your plea bargain?

2. What did any representative of the State, e.g., prosecutors, correctional officers, do or promise to do to make your life easier in prison?

The purpose of my inquiries are to determine whether the prosecutor provided me all details concerning your plea bargain and agreement to testify against Starr Lake.

I hope to hear form you soon.

Thank you for your cooperation

Very truly yours,
Michael E. de Grasse

MEdG/ck
cc: Starr Lake

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Starr M. Lake,
Petitioner,

v.

Belinda Stewart,
Respondent.

NO. CT-03-5006-CI

APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW the petitioner, Starr M. Lake, and applies for a certificate of appealability concerning her appeal of the judgment and order of May 13, 2003, that dismissed her petition, and the order of June 10, 2003, that refused to grant relief from the judgment.

The following points and authorities support the petitioner's application for a certificate of appealability which should be issued by this Court pursuant to 28 USC 2253(c).

POINTS AND AUTHORITIES

1. The standard that the petitioner must meet to obtain a certificate of appealability is "relatively low." *Williams v. Woodford,* 306 F. 3d 665,681 (9th Cir. 2002), quoting *Jennings v. Woodford,* 290 F. 3d 1006,1010 (9th Cir. 2002).

2. In considering the petitioner's application for a certificate of appealability, the Court should "resolve any doubt about granting a certificate of appealability in the petitioner's favor." *Williams v. Woodford,* 306 F. 3d 665,681 (9th Cir. 2002).

3. Where, as here, the petition was dismissed on procedural grounds, the required showing for a certificate of appealability involves two components. The petitioner must show that jurists of reason would conclude that whether the trial court was correct in its procedural ruling is debatable. Second, jurists of reason would conclude that whether the

petitioner was presented a valid claim of denial of a constitutional right is debatable. *Slack v. McDaniel,* 529 U.S. 473, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000).

4. Concerning the petitioner's constitutional claims, she has met the undemanding standard required by dispositive authority. As noted in *Lambright v. Stewart,* 220 F. 3d 1022, n. 5, (9th Cir. 2000):

> When a claim is denied on procedural ground, all of the inferences that govern a Rule 12(b) (6) motion apply to this situation. Thus, we take the petitioner's factual allegations as true and the non-moving party is entitled to the benefit of all reasonable inferences.

As stated by Judge William Fletcher in *Valerio v. Crawford,*306 F. 3d 742,745 (9th Cir. 2002), where the merits of the petitioner's constitutional contentions were not developed in the district court:

> Slack requires that we "simply take a quick look" at the face of the complaint to determine whether petitioner has 'facially allege [d] the denial of a constitutional right.' Petrocelli, 248 F. 3d at 885 (citation omitted);"

As shown by the attached excerpt from the petitioner's petition for habeas corpus, the petitioner has alleged five valid claims of denial of a constitutional right. A certificate of appealability should issue allowing all five claims to be pursued by the petitioner in the instant appeal.

5. Concerning the petitioner's challenge to the Court's procedural ruling, she has made the requisite showing. The Ninth Circuit law governing this point is found in *Lambright v. Stewart,* 220 F. 3d 1022,1024 (9th Cir. 2000) which relies on *Barefoot v. Estelle,* 463 U.S. 880, n. 4, 77 L. Ed. 2d 1092, 103 S. Ct. 3383 (1983). Thus, the petitioner must show that

issues she presents are debatable by jurists of reason and that Court could resolve the issues in a manner different from the trial court's resolution, or that the questions are "adequate to deserve encouragement to proceed further." These tests have been satisfied by the petitioner.

6. This Court based its conclusion that the petition was time-barred on *Nino v. Galaza,* 183 F. 3d 1003,1006 (9th cir. 1999). Although this Court's citation to *Nino* said as much, that passage is a mere dictum. Therefore, *Nino* should not be held to require dismissal of the petition. Rather, the Court should have applied the policy of the AEDPA favoring a full opportunity to exhaust state court remedies, as described in *Carey v. Saffold,* 536 U.S.___, 153 L. Ed. 2d 206, 122 S. Ct. (2002). Where, as here, the facts as set forth by the petitioner undisputedly show that she diligently pursued her state court remedies in a timely fashion, the rationale of *Carey, supra,* should apply. The petitioner should be allowed to pursue and complete a "full round of collateral review" in state court. *Carey,* 153 L. Ed. 2d at 268. The petitioner here did so pursue a full round of collateral review. Her efforts were timely. Indeed, the time spent by the petitioner in *Carey* and approved by the Ninth Circuit, shows that this petitioner moved through the state court system with alacrity. *Saffold v. Carey,* 312 F. 3d 1031 (9th Cir. 2002).

7. Empty, formalistic analysis should not trump the petitioner's right to the Great Writ. In *Carey,* prefiling preparation time in the state court appellate system did not count against the petitioner with respect to the AEDPA statute of limitations. In Washington, the entire process of collateral review is, in fact and in law, an appellate process. Washington State Rules of Appellate Procedure, RAP 16.3. Just as time spent in the appellate system prior to filing in *Carey* was regarded as time during which state court proceedings were "pending," time spent by the petitioner here in the

appellate system pursuing her collateral remedy should be regarded as time during which her state court petition was "pending"

CONCLUSION

This Court should issue a certificate of appealability allowing the petitioner to present all five constitutional questions to the reviewing court, as well as the question concerning the dismissal of her petition on procedural grounds.

Dated this 3rd day of July, 2003.

Respectfully submitted,
Michael E. de Grasse
Counsel for Petitioner

[Attachment to Application for Certificate of Appealability]

12. The petitioner is being held unlawfully on the following grounds:

FIRST GROUND

The petitioner was deprived of her right to due process because her trial judge was biased against her and in favor of the prosecution.

In summary, this ground is supported by these facts:

> The trial judge determined that the defendant was guilty before her trial. The trial judge determined to impose an exceptionally severe sentence before a request was made for an exceptional sentence, and contrary to the report of the presentence investigation. After a mistrial resulting from a deadlocked jury, nine members of which reportedly favored acquittal, and attendant publicity critical of the prosecution , the trial judge changed venue to a county of improper venue. This decision to change venue was made, sua sponte, without notice, without a hearing, without factual findings or foundation, and contrary to law. The trial judge denied the defendant's motion for a new trial by a decision that was contrary to federal law and without a full and fair hearing and without adequate findings of fact.

SECOND GROUND

The petitioner was deprived of due process by a sua sponte venue change to a county of improper venue.

In summary, this ground is supported by these facts:

Neither party requested a venue change after a mistrial in Benton County. The sua sponte change of venue to Garfield County was made by the trial judge, apparently, on the basis of factors that were never the subject of a hearing. The trial judge's determination to change venue was based on his own investigation conducted on his own and without notice to the parties. The trial judge's decision to change venue was made without notice, without a hearing, without factual findings and without evidence of record.

THIRD GROUND

The petitioner was deprived of due process and a fair trial by reason of a juror's failure to disclose material facts during voir dire.

In summary, this ground is supported by these facts:

A juror misrepresented and failed to disclose material facts about which clear, pointed and proper inquiry was made on voir dire. This juror had knowledge concerning material evidence submitted at trial that was not disclosed during voir dire.

FOURTH GROUND

The petitioner was deprived of due process and a fair trial by reason of improper communication between a juror and a bailiff.

In summary, this ground is supported by these facts:

In the course of jury deliberations, a juror engaged in unwitnessed, unrecorded and out-of-court conversation with a bailiff. The communication involved the juror's request to bring a book into the jury room to use in explaining the juror's knowledge of material facts to the other jurors.

The juror in question brought into deliberations her extraneous knowledge of material facts.

FIFTH GROUND

The petitioner was deprived of due process and a fair trial by an absence of appearance of fairness on the part of the trial judge.

In Summary, this ground is supported by these facts:

This ground is supported by the same facts set forth in support of the first ground, *supra.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Starr M. Lake, Petitioner, v. Belinda Stewart, Respondent.	NO. CT-03-5006-CI **DECLARATION IN RESPONSE TO SECOND ORDER TO SHOW CAUSE**

Michael E. de Grasse under penalty of perjury pursuant to the Laws of the State of Washington, RCW 9A.72.085, submits the following response to the second order to show cause entered March 3, 2003.

The instant petition for writ of habeas corpus filed January 21, 2003, is timely. The attached documents, together with the legal authority cited below, show that the petition should not be dismissed as time-barred:

1. A copy of the Mandate of the Court of Appeals of the State of Washington dated July 20, 2000, issued following the petitioner's appeal of her conviction.

2. A copy of a receipt dated July 16,2001, showing that the petitioner's personal restraint petition was Filed in the Washington State Court of Appeals, Division III, on July 16, 2001. Thus, the petitioner pursued collateral relief in state court in a timely fashion.

The petitioner should be allowed to pursue one, full-round of collateral review in the state court system. Principles of comity, finality and federalism are crucial to proper analysis of the instant issue. The rationale of *Carey v. Saffold,* 536 U.S. 214, 154 L. Ed. 2d 260, 122 S. Ct. 2134 (2002) should be applied. The petitioner should be held to have filed a timely federal habeas corpus petition.

Dated this 7th day of March, 2003, at Walla Walla, Washington.

Michael E. de Grasse
Counsel for Petitioner

[Attachment to Declaration]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

State of Washington, Respondent, v. STARR M. LAKE, Appellant.

MANDATE NO. 17568-5-III Walla Walla County NO. 97-1-00293-9

The State of Washington to: The Superior Court of the State of Washington, in and for Walla Walla County

This is to certify that the opinion of the Court of Appeals of the State of Washington , Division III, filed on December 2, 1999 became the decision terminating review of this court in the above-entitled case on July 11, 2000. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs in the amount of $219.19 are awarded to Respondent, State of Washington to be paid by Appellant, Starr M. Lake. Costs in the amount of $215.51 are awarded to the Office of Public Defense to be paid by Appellant, Starr M. Lake.
cc Starr M. Lake
Michael E. de Grasse
James L. Nagle
Jill M. Peitersen
Joseph M. Golden
Hon. Robert L. Zagelow
Indeterminate Sentence Review Board
Department of Corrections

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 20th day of July, 2000.
Clerk of the Court of Appeals, State of Washington Division III

[Attachment to Declaration]

STATE OF WASHINGTON COURT OF APPEALS–DIVISION III Spokane, Wash. 7-16, 2001
Received Two hundred & fifty &no/100 Dollars ($250.00)
Case no. 20337-9-III For Filing Fee
Title PRP of Lake

Clerk of the Court of Appeals
By s/ JZ

RECEIVED FROM
Michael de Grasse
PO Box 498
Walla Walla, WA 99362

31646

Check # 7555 Filing Fee $250.00

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Starr. M. Lake,
Petitioner,
v.
Belinda Stewart,
Respondent

NO. CT-03-5006-CI
DECLARATION IN RESPONSE TO ORDER TO SHOW CAUSE

Michael E. de Grasse under penalty of perjury pursuant to the Laws of State of Washington, RCW 9A.72.085, submits the following response to the order to show cause entered February 11, 2003. The instant petition for writ of habeas corpus filed January 21, 2003, is timely. These documents, copies of which are attached hereto, show that the petition should not be dismissed as time-barred:

1. Letter of Ronald R. Carpenter, Supreme Court Deputy Clerk, showing the petitioner filed a timely motion for discretionary review by which she sought review of the order of the Court of Appeals entered November 20, 2001, dismissing her personal restraint petition.

2. Ruling entered February 4, 2002, denying the petitioner's motion for discretionary review.

3. Letter of Ronald R. Carpenter, Supreme Court Deputy Clerk, of February 27, 2002, showing that the petitioner filed a timely motion to modify the ruling denying review of February 4, 2002.

4. Order denying motion to modify entered April 2, 2002.

5 . Certificate of Finality of the Court of Appeals, Division III, State of Washington, dated April 15, 2002, certifying that the Order Dismissing Personal Restraint Petition of November 20, 2001, became final on April 2, 2002.

On the basis of the foregoing, the petition should not be dismissed as time-barred.

Dated this 20th day of February, 2003.

Respectfully submitted,

Michael E. de Grasse
Counsel for Petitioner

[Attachment to Declaration}

THE SUPREME COURT
STATE OF WASHINGTON

C.J. MERRITT
Supreme court Clerk
RONALD R. CARPENTER
Deputy Clerk/Chief Staff Attorney
TEMPLE OF JUSTICE
P.O. Box 4092
Olympia, WA 98504-0929

December 17, 2001

Mr. Michael de Grasse
Attorney at Law
P.O. Box 494
Walla Walla, WA 99362

Honorable Patricia Crandall, Clerk
Division III, Court of Appeals
P.O. Box 2159
Spokane, WA 99210

Honorable James Nagle
Walla Walla County Prosecutor
204 W Alder, Suite 201
Walla Walla WA 99362

Re: Supreme Court No. 72001-1 In re the Personal Restraint Petition of Starr M. Lake Court of Appeals No. 20337-9-III

Clerk & Counsel:

The petitioner's "MOTION FOR LEAVE TO FILE OVER-LENGTH MOTION FOR DISCRETIONARY REVIEW AND STATEMENT OF COUNSEL" and a "MOTION FOR DISCRETIONARY REVIEW..."(which seeks review of the court of Appeals order that dismissed her personal restraint petition in the above referenced Court of Appeals cause number) were received and filed on this date.

The pleadings have been assigned the above referenced Supreme Court cause number.

By notation ruling I granted the "MOTION FOR LEAVE TO FILE OVER-LENGTH MOTION FOR DISCRETIONARY REVIEW AND STATEMENT OF COUNSEL"

By not later than January 16, 2002, the Respondent may serve and file an answer to the motion for discretionary review. The matter will be deemed submitted to the Court Commissioner upon receipt of the answer or the expiration of the time for filing the same, whichever is sooner.

The Clerk of Division III is directed to forward the entire file in the above referenced Court of Appeals cause number.

Sincerely,
RONALD R. CARPENTER
Supreme Court Deputy Clerk

RRC:crf

[Attachment To Declaration]
THE SUPREME COURT OF WASHINGTON

Filed Feb—4 2002 Clerk of Supreme Court State of Washington s/____

In re the Personal Restraint Petition of
STARR M. LAKE, Petitioner.
NO 72001-1 **RULING DENYING REVIEW**

Starr Lake was convicted of two counts of second-degree murder Division Three of the Court of Appeals affirmed her convictions on direct appeal, and this court denied review. *State v. Lake*, 98 Wn. App. 1020 (1999), review denied, 141 Wn.2d 1005 (2000). Ms. Lake timely filed a personal restraint petition in Division Three, but the Chief Judge dismissed the petition. Ms. Lake now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

Five of the six issues Ms. Lake raised were considered and rejected on their merits on direct appeal: whether the trial judge was biased, whether the trial judge violated the appearance of fairness, whether the trial judge improperly changed venue after the first trial, whether a juror improperly concealed material information about herself, and whether same juror improperly communicated with a bailiff and interjected special knowledge into the deliberations. Ms. Lake does not show that the interests of justice require that these issues be reconsidered *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1991). She claims she is raising "new" issues on these points, but simply recasting the same ground for relief in different legal arguments does not create a "new" claim that may be raised in a personal restraint petition. *In re Jeffries*, 114 Wn. 2d 485, 488, 789, P.2d 731 (1990). A "ground" is distinct legal basis for granting relief. In *re Taylor*, 105 Wn2d 683, 688, 717 P.2d 755 (1986). I am not persuaded that, on the issues listed above,

Ms. Lake's petition raises grounds for relief distinct from those she asserted on direct appeal.

Ms. Lake's one new argument is that the prosecutor violated his obligation to disclose material exculpatory evidence by failing to provide copies of notes, correspondence, and other documents concerning communications between the prosecutor and the attorney for the State's primary witness, Ms. Lake's accomplice. The attorney evidently also testified at Ms. Lake's trial. Ms. Lake claims that communications between the prosecutor and that no such documentation was generated. Ms. Lake presents nothing to contradict the prosecutor. She therefore fails to show the prosecutor violated any obligation of disclosure.

The motion for discretionary review is denied

s/_____
Commissioner
February 4, 2002

[Attachment to Declaration]

THE SUPREME COURT

State of Washington

C.J. MERRITT
Supreme Court Clerk
RONALD R. CARPENTER
Deputy Clerk/Chief Staff Attorney

TEMPLE OF JUSTICE
P.O. Box 40929
Olympia, WA

Mr. Michael de Grasse
Attorney at Law
P.O. Box 494
Walla Walla, WA 99363

Honorable Patricia Crandall, Clerk
Division III, Court of Appeals
P.O. Box 2159
Spokane, WA 99210

Honorable James Nagle
Walla Walla County
Prosecutor
240 W. Alder, Suite 201
Walla Walla, WA 99362

Re: Supreme Court No. 72001-1 In re the Personal Restraint Petition of Starr M. Lake Court of Appeals No. 20337-9-III

Clerk & Counsel:

The Petitioner's "MOTION TO MODIFY RULING" was received and filed on this date.

The motion to modify is set for consideration by a Department of the Court of the Court's April 2, 2002,Motion Calendar. The motion will be determined without oral argument, see RAP17.5(b).

Any answer to the motion should be served and received by this Court for filing by not later than March 18, 2002 Any reply to any answer should be served and received by this Court for filing by not later than March 27, 2002

Sincerely,

s/_____

Ronald R. Carpenter
Supreme Court Deputy Clerk
RRC:crf

[Attachment to Declaration]

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of STARR M. LAKE, petitioner.	**ORDER** No. 72001-1 C/ A No. 20337-9-III

Department II of the Court (Justice Owens did not sit and Justice Madsen sat in her place) considered this matter at its April 2, 2002, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

Dated at Olympia, Washington this 2nd day of April, 2002.

s/_____
Chief Justice

[Attachment to Declaration]

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Application for Relief From Personal Restraint of:

STARR M. LAKE, Petitioner,

CERTIFICATE OF FINALITY
No. 20337-9-III Walla Walla County No. 97-1-00293-9

The State of Washington to: The Superior Court of the State of Washington, in and for Walla Walla County

This is to certify that the Order Dismissing Personal Restraint Petition of the Court of Appeals of the State of Washington, Division III, Filed on November 20, 2001 became final on April 2, 2002.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 15th day of April, 2002
s/_____
Clerk of the Court of Appeals, State of Washington Division III

CC: Starr M. Lake
Michael E. de Grasse
James L. Nagle